United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1243

United States Court of Appeals

FOR THE SECOND CIRCUIT

TRANS WORLD AIRLINES, INC.,

Plaintiff-Appellee,

—against—

HOWARD R. HUGHES, HUGHES TOOL COMPANY and RAYMOND M. HOLLIDAY,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLEE TRANS WORLD AIRLINES, INC.

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Counter-Statement of the Issues

Plaintiff-appellee Trans World Airlines, Inc. ("TWA") submits that the issues actually presented on this appeal are:

1. Where the district court has awarded the prevailing parties costs of $1,184,045.10, including $1,015,625 for the cost of providing security in lieu of a supersedeas bond, does an appeal from the district court's disallowance of particular items of expense in providing such security present any reviewable issue?

2. In the alternative, should a judgment for substantial costs be summarily affirmed where the appellants, seeking

an increase in the amount allowed, have failed to demonstrate an abuse of discretion by the district court in disallowing certain items of costs?

3. Did the district court abuse its discretion in allowing as a set-off to an award of $1,188,647.75 as taxable costs, $4,602.65 of the expenses to which TWA was unnecessarily subjected when the prevailing parties refused, at the last minute and without prior notice, to comply with a lawful discovery order?

Counter-Statement of the Case

This Court needs no extensive recital of the tortured history of this lawsuit. A brief review of certain of its events is nonetheless required, since appellants' statement of the case is both incomplete and one-sided.

1. *Proceedings up to the default*

The complaint was filed on June 30, 1961. On August 9, 1961 defendant Hughes Tool Company* filed its motion to dismiss and for summary judgment, asserting (1) that the antitrust violations alleged in the complaint were within the exclusive jurisdiction of the Civil Aeronautics Board (the "CAB"), and (2) that the conduct alleged in the complaint was immune from prosecution under the antitrust laws because approved by the CAB. But Toolco elected not to bring that motion on for decision. On August 31, 1961 the action was assigned to Hon. Charles M. Metzner "for all purposes" (Doc. 1, p. A-33),** and Judge

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* Defendant Hughes Tool Company changed its name to Summa Corporation late in 1972, but here, as in the past, we will refer to it as "Toolco", and to defendants-appellants Toolco and Raymond M. Holliday collectively as "defendants".

** References herein to "Doc. " are to parts of the original record on appeal not reproduced in the printed appendix.

Metzner has presided over all proceedings in the action in the district court since that date.

In February 1962 Toolco filed its answer and counterclaims, naming two insurance companies, a commercial bank, an investment banking firm and a number of individuals as additional defendants (the "additional defendants"). After defendants had consumed an entire year by depositions of TWA, the district court on January 9, 1963 ruled that TWA and the additional defendants could commence their own oral discovery with the deposition of Howard R. Hughes, Toolco's sole stockholder and controlling person who, although a defendant, had never been served in the action. The district court's order confirmed an earlier ruling of the special master overseeing discovery in the case that the Hughes deposition, previously twice postponed, would begin on February 11, 1963 in Los Angeles, where Hughes then lived. Not until after this firm date for the Hughes deposition was fixed peremptorily did Toolco, on February 1, 1963, bring on for determination the motion to dismiss it had originally filed in August 1961. On February 6, 1963, the district court denied the motion, filing its opinion the next day (214 F. Supp. 106).

As the date for the Hughes deposition approached, Toolco was repeatedly asked whether or not that deposition would proceed. It was well aware that both TWA and the additional defendants were incurring substantial expenses in preparation for that deposition. Still, it was not until February 8, the last business day before the deposition was to begin, that Toolco for the first time informed the district court and the other parties that Hughes would not appear (Doc. 1, p. A-281). By this time both TWA and the additional defendants had already transferred files and personnel to Los Angeles and rented office space and equipment.

As a result of Toolco's refusal to proceed with the Hughes deposition and to obey certain other discovery orders, upon motions by TWA and the additional defendants the district court entered a default judgment in favor of TWA on its complaint on May 3, 1963 and dismissed five of Toolco's six counterclaims on May 28, 1973.*

The district court determined that TWA had incurred costs directly attributable to the failure of Hughes either to appear at his deposition or to give timely notice of his intention not to appear, amounting to $4,602.65. Costs in that amount were allowed to TWA by the district court in 1970 as part of the taxable costs to which the then successful TWA was entitled as part of its recovery against defendants (145a). Similar costs were awarded to the additional defendants in 1966 (*ibid.*).

2. *Proceedings with respect to security for stay of execution pending appeal*

Following entry of judgment for TWA in the amount of $145,448,141.07 plus interest on April 14, 1970 (Doc. 2, p. A-2073), defendants moved by order to show cause dated May 4, 1970, for a stay of execution pending appeal either without security or, alternatively, secured by a lien on specific property in lieu of a normal supersedeas bond (5a-6a). Hearings on defendants' motion were held before the district court on May 11, May 20 and June 3 (19a-70a).** At those hearings TWA argued that it was entitled to the full protection normally afforded to a successful litigant when execution is stayed pending appeal,

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* At the same time the Court entered summary judgment for TWA on a sixth counterclaim.

** The transcript of the June 3, 1970 hearing was placed under seal by the district court at Toolco's request and is not reproduced in the printed appendix. Four copies, under seal, of the transcript have been filed by Toolco with the Clerk of this Court pursuant to this Court's order.

but that if a bond in the full amount of the judgment were not to be provided, then TWA was entitled to some other form of undertaking, binding on Hughes personally, which would guarantee the ultimate collectability of the judgment. TWA pointed out that Hughes was personally outside the jurisdiction of the federal courts, and that he had both the absolute power to cause Toolco to take any action which he desired with respect to its assets and the habit of taking major actions in absolute secrecy. TWA suggested such alternatives as the hypothecation by Hughes of his stock in Toolco as security for the judgment, a personal undertaking by Hughes to the court that the judgment would be paid, and a reasonable restriction on Toolco's payment of dividends to Hughes, its sole stockholder (22a-25a, 30a, 51a-52a, 54a-55a, 63a-64a; Transcript of Hearing of June 3, 1970, pp. 8-11, 22). None of these steps would have involved any significant expense, either to Toolco or to Hughes. Toolco's position, however, as the district court itself stated (80a; *see also* 202a), was that it should be permitted, without providing a bond in any amount, "to conduct business as usual," an enterprise which, at that time, apparently included converting its cash and other high-liquidity assets into fixed assets (71a-72a, 80a). In lieu of the affirmative guaranty sought by TWA, Toolco volunteered to provide quarterly audit reports from its auditors, Haskins & Sells (Transcript of Hearing of June 3, 1970, p. 23).

On June 10, 1970, the district court entered an opinion and order directing defendants to post security in the amount of $75 million with the balance of the judgment to be secured by Toolco's maintaining its net worth at three times the amount of such balance (81a). After further hearings were held on the form and nature of security to be provided by defendants (82a-85a, 94a-103a), the final form of security, including substitution of a letter of credit

in lieu of a supersedeas bond in the amount of $75 million, was approved by the district court by orders dated June 16, 1970 (86a-91a) and June 25, 1970 (104a-107a).

3. *Proceedings with respect to taxation of costs*

After review by this Court, which affirmed the judgment below (449 F.2d 51 (1971)), and by the Supreme Court, which reversed (409 U.S. 363 (1973)), a judgment dismissing TWA's complaint was entered by the district court on May 23, 1973 (112a). Defendants filed a verified bill of costs in the amount of $2,186,919.24 on September 17, 1973 (113a-114a). In proceedings for taxation of costs held before the Clerk of the Southern District, TWA presented its objections to taxation of specific items of costs as well as its general objections to taxation of any costs against it except for a reasonable premium on the supersedeas bond (121a-127a). On October 16, 1973 the Clerk entered a judgment for costs against TWA in the amount of $1,941,639.15 (115a).*

TWA moved before the district court for retaxation of costs on October 23, 1973 (116a-169a), and an oral argument on that motion was held on November 15, 1973 (186a-200a). In an opinion and order dated January 10, 1974 (201a-202a), the district court:

> (1) under the category "cost of bond" in defendants' bill of costs, confirmed the Clerk's award to defendants of $1,015,625 as a premium on the $75 million letter of credit but disallowed the Clerk's taxation of an additional $683,805.40 (representing $66,040.40 for

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* This amount did not include the $71,521.42 in costs awarded to defendants by this Court which was itemized in the verified bill of costs, since TWA paid those costs to defendants on October 3, 1973 (Doc. 45). TWA had also paid defendants $16,847.24 for costs in the Supreme Court.

charges incurred purportedly in connection with security for the letter of credit and $617,765 for charges by Haskins & Sells, Toolco's auditors, for quarterly audits*);

(2) rejected TWA's argument that it was the prevailing party with respect to Toolco's counterclaims, and that consequently each side should bear its own costs at the district court level,** and confirmed the Clerk's award to defendants of $173,022.75 as costs at the district court level; and

(3) awarded TWA a set-off of $4,602.65 for its expenses incurred in preparation for the Hughes deposition in California that had been precipitously cancelled by defendants' last minute announcement that Hughes would not appear.

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* The Clerk actually taxed $686,951 for these audit charges, but defendants conceded in opposing TWA's motion to retax that $69,186 of this amount had been improperly charged against TWA, since it represented audit expenses not related to TWA's security (171a-172a; 201a).

** Although TWA believes that this is a substantial argument, *Srybnik* v. *Epstein*, 230 F.2d 683 (2d Cir. 1956); *Brunswick-Balke-Collender Co.* v. *American Bowling & Billiard Corp.*, 150 F.2d 69 (2d Cir.), *cert. denied*, 326 U.S. 757 (1945), it determined not to take a cross-appeal since this ruling, like those from which defendants appeal, does not constitute a clear abuse of discretion by the district court.

ARGUMENT

I

Defendants' appeal does not raise any reviewable issues and should be dismissed, or, alternatively, the Judgment below should be summarily affirmed.

Defendants who were awarded costs in the amount of $1,184,045.10 by the district court, are appealing from the disallowance of particular items of costs under the single category of "cost of bond". Historically it was the general rule in the federal courts that a judgment solely for costs is not appealable where the *power* of the trial court to assess or refuse to assess costs (as opposed to the amount assessed) is not in dispute. See *Newton* v. *Consolidated Gas Co.*, 265 U.S. 78, 82-84 (1924), which cites a number of earlier cases. *See also Reconstruction Finance Corp.* v. *J. G. Menihan Corp.*, 111 F.2d 940, 941 (2d Cir. 1940), *aff'd*, 312 U.S. 81 (1941); *Association of Western Rys.* v. *Riss & Co.*, 320 F.2d 785, 790 (D.C. Cir. 1963). This Court on occasion has allowed such appeals, but has found a reviewable abuse of discretion only in special circumstances, as in *Harris* v. *Twentieth Century-Fox Film Corp.*, 139 F.2d 571 (2d Cir. 1943), in which the court below had failed to follow a federal statute providing a mandatory allowance of $2.50 for each deposition admitted in evidence, and in *Farmer* v. *Arabian American Oil Co.*, 324 F.2d 359 (2d Cir.) (*en banc*), *rev'd*, 379 U.S. 227 (1964), in which it was held that the action of a second district court judge in retaxing costs which had been taxed by a prior district court judge constituted an abuse of discretion, since the exercise of discretion by the first judge should not have been interfered with.

Plainly the grounds for an appeal from a judgment for costs are narrowly limited. The Court in *Farmer* stated the rule as follows:

> "We hold that *when, as here, the question is not whether the district judge should have allowed or disallowed particular items of cost,* but is rather whether he exceeded and therefore abused, his discretion, a judgment solely for costs is appealable." (324 F.2d at 361-362; emphasis added.)

But whatever words defendants choose to use in describing the alleged errors below, the precise issue presented is simply "whether the district court should have allowed or disallowed particular items of cost." That issue is not appealable.

At a time when this Court has expressed an entirely justified concern about the great number of appeals which do not merit submission to the full appellate process, it would appear particularly appropriate to dismiss an appeal like defendants' which, despite the amount of money involved, presents no issue beyond a plea that this Court review *de novo* matters which, in the words of the Supreme Court in *Newton, supra,* are best left to "the discretion vested in the trial court * * * and the better opportunity of that court to exercise that discretion from its greater intimacy with details of the pleadings, hearings, and orders in the case * * *." (265 U.S. at 83)

In any event, since the district court did not so manifestly abuse its discretion in disallowing the items of cost in question as to justify extended consideration by this Court, *Harris* v. *Twentieth Century-Fox Film Corp., supra,* 139 F.2d at 572-73; *Prudence-Bonds Corp.* v. *Prudence Realization Corp.,* 174 F.2d 288, 289 (2d Cir. 1949), this case calls at most for summary affirmance of the judgment below.

II

The district court did not abuse its discretion in disallowing the particular items of costs which are the subject of defendants' appeal.

Hon. Charles M. Metzner has presided over every proceeding in the district court in this action since August 1961, including every proceeding of pertinence to defendants' appeal. Judge Metzner's disallowance of the two items of cost, which defendants challenge on this appeal, was not only plainly within his discretion but manifestly correct.

1. *Charges for quarterly audits*

Despite defendants' assertions, the record is clear that the quarterly audit reports were volunteered* by them as an alternative to the positive protection which TWA was seeking against activities by Hughes, over whom the court had no jurisdiction and who had in the past proven distinctly unavailable to lawful process of the court. TWA repeatedly urged some form of undertaking which would have been binding upon Hughes and would have guaranteed the ultimate collectibility of the judgment. TWA's position was not based upon any doubt as to the ability of Toolco at that time to pay the judgment, but rather upon the perceived need of some protection against actions by the elusive Mr. Hughes that would substantially impair that ability—a perception in which the district court concurred (Transcript of Hearing of June 3, 1970, p. 14). Since defendants could have provided this protection at little or

* Defendants' counsel so stated to the district court at the hearing on June 3, 1970 (p. 23).

no cost in the ways suggested by TWA at the time,* the district court was clearly right in disallowing taxation against TWA of the cost of proceeding in a manner suggested by defendants as more convenient to them.

As the district court held, the audits

> "* * * were accepted by the court at the request of the defendant as a less drastic but more costly form of protection of the judgment recovered by the plaintiff. It is perfectly clear from the proceedings in the spring of 1970 that Toolco was most interested in conducting business as usual. 314 F.Supp. 94 (S.D.N.Y. 1970). Since the defendant needed and was using millions of dollars to buy a hotel and an airline, and making alterations to hotels at the time it was called on to bond the judgment, it should bear the cost of allowing business to go on as usual." (201a-202a)

This ruling is fully in accord with the applicable precedents. Thus in *Aegean (Shipbrokers) Ltd.* v. *Henriksen's Rederi A/S*, 165 F.Supp. 939 (D.Mass. 1958), the prevailing party sought interest on cash collateral supplied in connection with a bond premium. The district court refused to award the interest, stating:

> "[T]he rule requires a showing of reasonableness [of the expenditure]. There is nothing to indicate respondent could not have deposited with the surety interest-bearing securities, or savings-bank books. *It is not reasonable to charge petitioner for avoidable consequences.*" (165 F.Supp. at 940; emphasis added.)

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* Whatever the details which would have had to have been negotiated with respect to the implementation of TWA's proposals, it is clear that they could have been accomplished with little or no cost to Toolco. While TWA obviously wanted whatever security it could obtain, it should not be charged for the more costly alternative favored by defendants. Defendants' hypothetical calculations (Def. br., p. 10) are therefore totally irrelevant.

Accord: American Hawaiian Ventures, Inc. v. *M.V.J. Latuharhary*, 257 F.Supp. 622, 631 (D.N.J. 1966); *Keystone Shipping Co.* v. *S S Monfiore*, 275 F.Supp. 606, 607 (S.D. Tex. 1967), *aff'd*, 409 F.2d 1345 (5th Cir. 1969); *see also, Kemart Corp.* v. *Printing Arts Research Laboratories, Inc.*, 232 F.2d 897, 900-01 (9th Cir. 1956). The single case relied upon by defendants, *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products*, 316 F.2d 275 (9th Cir. 1962), is not in point since in that case the interest payments allowed were incurred in purchasing securities deposited in lieu of a bond which, the prevailing party there proved, would have cost $90,000 more. Here defendants chose the more expensive means for insuring their ability to do "business as usual."

2. *Additional charges paid to the Bank of America*

Defendants sought in this item to charge TWA with the cost of a title search, a county clerk's filing fee and additional fees paid to the Bank of America with respect to a deed of trust which defendants claim was required by the Bank of America as part of the letter of credit arrangement. Defendants made no showing of the reasonableness and necessity of these charges. The documents with respect to the letter of credit agreement reveal that the security interests created in favor of the Bank of America also constituted security for "any other obligations" of Toolco to the Bank of America (165a). The Bank of America has been for many years the leading bank both for Toolco and for Howard Hughes personally, and security arrangements covering all Toolco's obligations to the bank are hardly matters to be charged against TWA.

Furthermore, such charges were not disclosed at the time of the district court's approval of defendants' security arrangements. Unlike the stand-by interest charges on the

$75 million provided under the letter of credit which were within the contemplation of TWA as a potential taxable cost should defendants prevail on appeal, such undisclosed underlying charges are properly part of the private arrangement between defendants and the Bank. *Kemart Corp.* v. *Printing Arts Research Laboratories, Inc., supra; Theofano Maritime Co.* v. *9,551.19 Long Tons, etc.*, 122 F.Supp. 853, 857 (D.Md. 1954). The district court was clearly correct in disallowing this item.

III

Allowance of the set-off for the expenses incurred by TWA in connection with the Hughes deposition was entirely proper.

The fact that defendants devote only two short paragraphs, without citation of a single authority, to this issue is a telling concession of the weakness of this point of their appeal. The district court exercised its discretion under Fed.R.Civ.P. 37(b)(2) to award TWA as a set-off the expenses which it undeniably incurred because defendants chose at the last possible moment to disobey the court's lawful order that Hughes appear for his deposition on February 11, 1963.

When certain statements by defendants' counsel suggested that Hughes's attendance at his deposition might be in doubt, the special master on January 17, 1963 expressly asked defendants what their intentions were; it was made plain to them that the special master, the other parties and, indeed, the Chief Judge and court personnel of the United States District Court for the Southern District of California in Los Angeles were all making extensive preparations in the expectation that the deposition would take place as scheduled (see Doc. 3, pp. A-2576-A-2578). On January 19, TWA and the additional defendants informed

the district court that they would be incurring considerable expenses in preparation for conducting the deposition at the United States Courthouse in Los Angeles, and at that time defendants were expressly directed to notify the court, the special master, and the other parties if they preferred to have the depositions taken at some other place (Doc. 1, pp. A-127-A-132). Once more, at a hearing before the special master on January 23, defendants were reminded that the parties were proceeding with their necessary preparations for the Hughes deposition (Doc. 3, pp. A-2606-A-2607). Had defendants merely given sufficient advance notice of their intention not to go forward with the Hughes deposition, as they had been repeatedly asked to do, these costs need never have been incurred.

If citation of authority beyond the plain language of Rule 37* is required to demonstrate the justness of the district court's set-off award in these circumstances, it is plainly available in abundance. *E.g., Gibbs* v. *Blackwelder*, 346 F.2d 943, 947 (4th Cir. 1965); *Haney* v. *Woodward & Lothrop, Inc.*, 330 F.2d 940, 946 (4th Cir. 1964); *Shapiro* v. *Freeman*, 38 F.R.D. 308, 312-13 (S.D.N.Y. 1965); *Hunter* v. *International Systems & Controls Corp.*, 56 F.R.D. 617, 631-32 (W.D.Mo. 1972); *Hendricks* v. *Alcoa Steamship Co.*, 32 F.R.D. 169, 173 (E.D.Pa. 1963); *Stephens* v. *Sioux City & New Orleans Barge Lines, Inc.*, 30 F.R.D. 397, 398 (W.D. Mo. 1962).

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* The 1970 amendments to the Federal Rules added the following sentence to section (b)(2) of Fed.R.Civ.P. 37:

> "In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust."

As the cases cited in the text make plain, however, even prior to those amendments, awarding such costs was an appropriate sanction under Fed.R.Civ.P. 37.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this appeal should be dismissed or, alternatively, that the judgment of the district court should be summarily affirmed.

Dated: New York, New York
June 12, 1974

Respectfully submitted,

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